No. 80-1785

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

A & B FREIGHT LINES, INC., ET AL., *Petitioners,*

v.

FEDERAL TRADE COMMISSION, ET AL., *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITIONERS' REPLY TO MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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PETITIONERS' REPLY TO MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

This brief is submitted in reply to the memorandum for the Federal Trade Commission in opposition to the petition for writ of certiorari. This reply brief responds to the FTC's argument that the petitioners did not allege irreparable injury in their complaint.

ARGUMENT

The FTC asserts that "[i]n this Court, A & B concedes that it did not show irreparable injury" (Memorandum, p. 2). This is not so. Petitioners, A & B et al., explained that while they were not required to show irreparable injury in a case such as this, the complaint does in fact allege irreparable injury.

The FTC agrees that "[i]rreparable injury is that imminent harm which cannot be remedied by way of an action at law. *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975)" (Memorandum, p. 3). The types of injury set forth in the complaint meet this criterion.

As petitioners established, the FTC is gathering and compiling information about carriers which it has used to support positions harmful to carriers in ICC proceedings and in proceedings of other regulatory and legislative forums. The petitioners have had to expend considerable time, resources, and effort to rebut the studies which are produced from this information. Manifestly, if the FTC's actions are unlawful, a showing that the petitioners will be required to expend effort to rebut the product of that activity would be sufficient to demonstrate harm.

While the FTC denies that it is acting unlawfully in gathering and compiling information on motor carriers, the Court of Appeals obviously did not agree with this contention, for it failed to affirm the District Court's finding on this point. Clearly, the FTC is exceeding its authority under the Federal Trade Commission Act. The Act specifically excepts common carriers from the grant of authority to the FTC "to gather and compile information concerning *** any person *** engaged in or whose business affects commerce ***." Section 6a of the Federal Trade Commission Act, 15 U.S.C. §46(a). And, as the FTC acknowledges in its memorandum, it "has compiled certain information and hired consultants to study the motor common carrier industry" (Memorandum, p. 1). Hence, its argument that it "has not violated any statutory provision" is wholly specious.

Petitioners further established that the harm they are suffering cannot be remedied by way of an action at law. The FTC suggests that the petitioners have a

remedy before the ICC, but that agency clearly has no jurisdiction to determine if the FTC is violating the FTC Act. Moreover, even if petitioners were able to raise their claim upon judicial review of an ICC order, that fact would not bar a proceeding to enjoin the FTC where "jurisdictional defects are apparent on the face of the record" and where there will be no judicial interference with an ongoing agency proceeding. See *California ex rel. Christensen* v. *FTC, 549 F.2d 1321, 1324 (9th Cir. 1977); Leedom* v. *Kyne,* 358 U.S. 184 (1958). In addition, of course, petitioners complain of more than FTC participation in ICC proceedings.[1] Clearly, therefore, petitioners have no adequate remedy at law.

Petitioners stand on exactly the same footing as did the plaintiffs in *Leedom* v. *Kyne, supra.* As the FTC points out at page 3 of its memorandum, in that case this Court said that without equitable relief, the plaintiffs there would suffer the "sacrifice or obliteration of a right * * *, for [which] there is no other means, within their control * * * to protect and enforce * * *." 358 U.S. at 190. The right which is being obliterated here is, as the Court put it in *FTC* v. *Miller*, 549 F.2d 452 (7th Cir. 1977), the "clear right, conferred upon [the carriers] by statute, to be free from [FTC] investigation." We have shown that the carriers have no other means within their control to protect that right. Accordingly, the *Kyne* doctrine is controlling here, and requires this Court to reverse the court of Appeals.

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[1] Petitioners complain of the FTC's gathering and compiling information about them in violation of the statutory prohibition, and the use of that information to support positions harmful to carriers in legislative forums and in proceedings of other state and federal regulatory agencies besides the ICC.

CONCLUSION

For the reasons stated above, as well as those stated previously, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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